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Beyond the Politics of Federalism: An Alternative Model

Susan Bartlett Foot†

In *Regulation and Federalism*,¹ C. Boyden Gray describes a theoretical framework for distributing regulatory authority in a federalist state. In this comment, I provide an alternative model that goes beyond Gray's framework to establish specific criteria for allocating regulatory power between the states and the federal government.

I. Gray's Model

Gray's framework rests upon the two Reagan Administration initiatives of regulatory relief and the New Federalism.² In support of these principles, Gray recommends a presumption in favor of state-level regulation. This presumption may, however, be rebutted if, under any one of four "rubrics" (burdens on interstate commerce, federal accommodation, interstate competition, or federal expertise), legitimate federal interests outweigh those of the states.³

This framework suffers from two significant limitations. First, it lacks criteria for determining when the federal interest represented by one of the four rubrics is sufficiently important to overcome the presumption in favor of regulation at the state level. In the absence of specific criteria, politics, rather than guiding principles, often determines when the presumption will be overcome. Second, the framework forces a stark choice between exclusive state control or exclusive federal control through preemption. Without a mechanism to accommodate competing federal and state interests, pressure for federal exclusivity may seriously undercut the

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1. Gray, *Regulation and Federalism*, 1 YALE J. ON REG. 93 (1983).

2. *Id.* at 94.

3. *Id.* at 96.

legitimate interests of the states—an unexpected result for a model based upon the principles of the New Federalism.

To protect state interests, our lawmakers must move beyond politics and develop principles to guide the allocation of regulatory authority. Recently, many states have responded to the lack of federal regulatory activity by increasing the number of state regulations.⁴ In response, advocates of deregulation, who formerly were opposed to regulation at any governmental level, have turned with increasing frequency to Washington to ask for centralized regulations that preempt state laws.⁵ Thus, the pattern of the 1970's, when protection-minded consumers sought safety under the wing of federal agencies and deregulation advocates favored state autonomy, has reversed. Amidst this swirl of shifting allegiances and political pressures, there is a danger that important state interests will be overlooked. This possibility creates the need for a searching reevaluation of the politics and principles of federalism.

I propose an alternative model that goes beyond Gray's framework to accommodate both federal and state interests in social regulation.⁶ After providing a doctrinal basis for the model, I shall describe and apply it to a recent regulatory controversy. This example illustrates the differences between Gray's proposed framework and my own.

II. Accommodating State & Federal Interests

The doctrine of independent state grounds, which is rooted in federal and state constitutional law,⁷ provides an excellent means for characterizing the relationship between federal and state governments in social regulation. Under this doctrine, state constitutions may supplement and expand federally guaranteed constitutional rights, but cannot conflict with or undermine them. In addition, any expansion of individual rights by state constitutions cannot infringe upon other rights protected by the federal Constitution. For example, a state-created First Amendment right to circulate literature on private property is proper only when it does not im-

4. *State Regulators Rush In Where Washington No Longer Treads: Will the New Federalism Create A 50-Headed Hydra?*, BUS. WK., Sept. 19, 1983, at 124.

5. *Id.* See also Wall St. J., Nov. 23, 1983, at 7, col. 1 (chemical industry requesting uniform federal regulation of chemical labeling).

6. While economic regulation governs prices, output, terms of competition, entry, and exit, social regulation focuses on the impact on society of this economic activity. See Weidenbaum, *The New Wave of Government Regulation of Business*, 15 BUS. & SOC'Y REV. 81, 81-82 (1975). The discussion in this Comment is limited to social regulation because Gray's framework primarily applies to issues in this area. The federal and state interests in economic regulation are also different from those raised by social regulation. This model may, however, have more general applications to federalism issues in other contexts.

7. For an extensive discussion of this doctrine, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982).

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pinge on property rights protected by the federal Constitution.⁸ State constitutional guarantees thus occupy the space between the federal floor of minimum constitutional protection and the federal ceiling set by other constitutionally protected interests.

Historically, protection of health and safety was the exclusive province of the states; the federal government's role was to prevent state regulations from burdening interstate commerce.⁹ During the 1960's and early 1970's, however, the federal government, through the creation of regulatory agencies, enacted a broad range of national minimum health and safety standards.¹⁰ The federal government thus established both a federal floor and ceiling, as if applying the doctrine of independent state grounds to social regulation. This framework can be used as a model to allocate regulatory authority between states and the federal government. The federal government both sets national minimum standards and protects the Union against state-imposed trade barriers, but the states retain residual powers to regulate within these boundaries.

III. The Alternative Model

The purpose of the alternative model is to accommodate the legitimate interests of both the states and the federal government. To do so it is necessary to identify the boundaries of these interests with some precision. These boundaries can be found by dividing regulation into five discrete stages.

Stage 1: The Product. This stage involves regulation of the attributes of the product, such as design and performance standards. Uniform national product standards protect both the federal interest in safety and health and the free flow of interstate commerce. Supplemental state regulations governing product attributes generally impede the national market. For example, if an individual state establishes product standards which are more protective than those established at the federal level, manufacturers

8. See *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (State constitutional provisions permitting individuals to exercise free speech and petition rights on property of a privately owned shopping center do not violate owner's property rights under the fifth and fourteenth amendments or free speech rights under the first and fourteenth amendments.)

9. See *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) (invalidating as undue burden on commerce a North Carolina statute that prohibited the display of Washington State's apple grading system on containers entering North Carolina); *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (invalidating as undue burden on commerce an Arizona order requiring a local canteloupe producer to build and operate a packing plant rather than ship the fruit to California for packing and inspection).

10. Examples include the Occupational Safety Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. § 651-678 and in scattered sections of 15, 25, 30, & 42 U.S.C.); the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2600-2629; and the Consumer Product Safety Act of 1972, 15 U.S.C. §§ 2051-2083 and 5 U.S.C. §§ 5314-5315.

will either impose those higher standards on other unwilling states or forego the market in the more protective state. In essence, regulations adopted by individual states are inappropriate when they impose costs on manufacturers by interfering with economies of scale that would otherwise be available in the production of nationally distributed goods.¹¹ In Stage 1, therefore, the federal interest in the national market generally outweighs the states' interest in establishing stricter health and safety standards, and justifies preemption of supplemental state requirements.

Stage 2: Production. Regulation at this stage addresses both the impact of production on nationwide health and environmental standards and site-specific workplace and community issues. For example, pollution from one source may affect the air or water quality in many states, but work-related exposure to toxic chemicals will only affect workers at an individual plant. Economies of scale in decisionmaking,¹² the tragedy of the commons,¹³ and interstate competition¹⁴ all suggest a federal role in regulating production. As Gray's rubrics recognize, centralized decisionmaking is a desirable response to these problems. However, federal involvement should not preempt all state-imposed regulation of production because more restrictive state laws may not always undermine the federal safety floor or burden interstate commerce. Where the health or environmental effects of additional state production regulations are purely in-state, federal preemption is not justified.

Stage 3: Process of Exchange. Regulation of the process of exchange involves requirements for information to accompany the product, such as labeling, patient package inserts, or instructional brochures. For some information requirements, federal uniformity may be justified to protect the

11. This problem was clearly a concern when Congress granted California a waiver from the preemption sections of the Air Quality Act of 1967, 42 U.S.C. § 7543 (1976 & Supp. V 1981), permitting that state to enact more stringent auto emissions standards on new vehicles. See *Hearings on Problems and Progress Associated with the Control of Automobile Exhaust Emissions (Automotive Air Pollution, Part 1) before the Subcomm. on Air and Water Pollution of the Senate Comm. on Public Works*, 90th Cong., 1st. Sess. 107, 403 (1967).

12. See Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1210 (1977) (economies of scale occur when technically complex issues are decided more cheaply once at the national level than repeatedly at the state and local level); Gray, *supra* note 1, at 109 (arguing that where regulatory efforts require "highly specialized scientific and technical expertise" it is most efficient for the "federal government to take the lead in developing standards").

13. See Stewart, *supra* note 12, at 1211 (the "tragedy of the commons" arises when the self-interest of rational but independent decisionmakers leads to results that leave all decisionmakers worse off than they would have been if collective agreement had been possible); Hardin, *The Tragedy of the Commons*, 83 SCIENCE 1234 (1968).

14. See Stewart, *supra* note 12, at 1212 (interstate competition to attract new industry may lead to state regulation at the lowest common denominator, such as weak environmental standards); Gray, *supra* note 1, at 106 (arguing that states may seek to attract "industry, funds or population by creating regulatory programs that are more lenient than those of other states" and that federal regulation may be necessary to prevent the "undesirable effects of this competition").

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national flow of commerce. This argument for preemption will not, however, be determinative in all cases. For example, state information requirements that do not affect the product package will not burden the national market because such regulations do not limit manufacturers' economies of scale in packaging products for distribution in the national market. Therefore, while federal intervention in the process of exchange may be justified, federal preemption of all state requirements is not.

Stage 4: Conditions of Sale or Services. Regulation at this stage involves requirements for the sale of products or provision of services imposed at the point of sale. In virtually every case, these requirements have an exclusive in-state impact and consequently do not burden the national market. Therefore, if these state-mandated conditions do not undermine federal safety standards, preemption is unjustified.¹⁵ Licensing requirements for health care professionals or other service providers, for example, are generally the prerogative of states.¹⁶ Similarly, additional state-imposed restrictions on alcohol, fireworks, and other dangerous products sold within their borders should not be preempted.

Stage 5: Conditions of Use. Regulation at this stage encompasses requirements imposed on the use of products or services. These regulations, like those imposed at Stage 4, generally have an exclusive in-state impact, and should not be preempted unless they undermine the federal safety floor. For example, state requirements establishing preconditions for the use of dangerous products, such as mandatory safety training, have no interstate commerce effect and thus should not be preempted arbitrarily.

IV. Application of the Alternative Model: Chemical Labeling

An examination of the federal chemical labeling decision,¹⁷ a recent example of social regulation, illustrates how the alternative model works to accommodate both state and federal interests.

In response to concerns over the hazards posed by chemicals in the workplace, many states and municipalities adopted varying regulations

15. Preemption may be justified, however, where state rules conflict with other federal rights, such as the first amendment. See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that, although states have a legitimate interest in regulating time, place and manner of lawyer advertising, they may not unreasonably restrict the first amendment rights of lawyers to disseminate, and the right of the public to receive, information on cost and availability of legal services).

16. See Ruben, *The Legal Web of Professional Regulation*, in *REGULATING THE PROFESSIONS* 29, 35-36 (1980) (State licensing of professions is "so ingrained . . . that it has become synonymous with professionalization in the United States.") Recently, the federal government has begun to assert some control over the professions, primarily through the Federal Trade Commission and the Antitrust Division of the Justice Department, *Id.* at 39, but comprehensive federal preemption of state licensing requirements is "remote." *Id.* at 47. The theory developed in this Comment indicates that such federal regulation is inappropriate.

17. *Hazard Communication*, 48 Fed. Reg. 53,280 (1983).

addressing this problem.¹⁸ As a consequence, the Occupational Health and Safety Administration (OSHA) promulgated a national standard last year.¹⁹ The purpose of OSHA's rule, which the chemical industry strongly supported,²⁰ was to establish mandatory uniform standards for both manufacturers and employers,²¹ thereby preempting more stringent state requirements.²² To achieve this goal, OSHA will scrutinize all state and local chemical labeling requirements to gauge their conformity with the federal standard.²³ Legal challenges to the rule were filed as soon as it was issued,²⁴ and undoubtedly the Supreme Court will eventually determine the scope of OSHA's preemptive authority. The significant policy question the rule raises, however, is whether federal preemption of all existing or future state chemical labeling laws undermines important state interests which do not infringe on legitimate federal interests.

Gray supports federal uniformity under the OSHA rule, arguing that the presumption in favor of state regulation should be rebutted "to discourage the adoption of burdensome and inconsistent local laws."²⁵ Gray's model, however, lacks criteria for determining what constitutes a "burdensome" state law that would justify federal preemption. Arguably, several state requirements are always more "burdensome" than a single federal standard. Does this mean states should acquiesce whenever their laws are more stringent than federal requirements? Without some mechanism to accommodate both federal and state interests, OSHA's uniform federal standard may undermine the sovereign role of the states in protecting the safety and health of their workers, and state officials may soon find themselves battling to prevent preemption of their more protective statutes.²⁶

In contrast, the alternative model provides the necessary mechanism for

18. The states of Arizona, California, Connecticut, Maine, Massachusetts, Michigan, New York, and Washington, and the City of Philadelphia have all enacted statutes in the hazardous chemicals area. Hazard Communication, 47 Fed. Reg. 12,092, 12,095, 12,100 (1982). Furthermore, at the time the OSHA rule was proposed, New Jersey, Ohio, Wisconsin and such cities as Louisville, Ky., and Santa Ana, Cal., were in various stages of enacting similar legislation. *Id.*

19. 48 Fed. Reg. 53,280. This rule was adopted after the publication of Gray's article. Though substantially similar to the proposed rule discussed by Gray, OSHA's stated position on the preemptive effect of its rule was significantly stronger in the final rule.

20. See *An OSHA Rule Industry Wants Despite the Cost*, BUS. WK., Nov. 7, 1983, at 47.

21. Hazard Communication, 48 Fed. Reg. 53,343 (1983) (to be codified at 29 C.F.R. § 1900.1200 (f)(1)-(9)) ((f)(1) and (2) apply to manufacturers, (f)(4)-(8) apply to employers, and (f)(3) and (9) apply to both).

22. *Id.* at 53,322 (Hazard Communication rule "preempts competing state standards which do not meet certain procedural and substantive criteria").

23. *Id.* See also 29 U.S.C. § 667(c)(2) (1982) (allows states to petition for approval of regulations "at least as effective" as the federal OSHA regulations).

24. See *Public Citizen v. Aucter*, No. 83-3565 (3d Cir. filed Nov. 25, 1983) (filed by a coalition of public interest, health, and labor groups the day the final rule was issued).

25. Gray, *supra* note 1, at 103.

26. Such battles will occur under the authority of the OSHA Act, which established a procedure allowing states to apply for exemption from preemption. See *supra* note 21.

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protecting important state interests. An examination of federal regulations, using the decisionmaking criteria of each regulatory stage, highlights the affected state interests and determines the appropriateness of federal action.

The final OSHA rule addresses workplace hazards by mandating labeling,²⁷ the availability of safety data sheets,²⁸ and employee information and training.²⁹ These requirements encompass several stages on the regulatory spectrum.

The OSHA labeling standards fall into two categories: some apply to manufacturers and others to employers.³⁰ The labeling requirements applying to manufacturers are Stage 3 regulations governing the “process of exchange.” To protect the national market, these Stage 3 regulations justifiably may be preempted. This preemption results because a variety of state labeling rules mandating that specific language be affixed to containers prior to shipping will increase manufacturers’ costs (and decrease the scale economies) in distributing products nationally. In contrast, the labeling requirements for employers—involving in-plant signs on stationary containers³¹ or pipes—are site-specific and do not burden the national market. State requirements imposed on plants within state borders are Stage 2 regulations protecting employee safety in the workplace, rather than Stage 3 regulations imposed at the point of manufacture. The purely in-state impact of such Stage 2 safety requirements renders federal preemption inappropriate. In sum, although OSHA officials assumed broad preemptive authority over both manufacturer and employer labeling regulations, these regulations have very different effects on state and federal interests and should be considered separately.

The OSHA rule requires manufacturers to provide the purchasers of hazardous chemicals with material safety data sheets,³² which contain information about the safe handling and use of hazardous chemicals.³³ The rule sets standards for the sheets³⁴ and preempts more extensive state requirements.³⁵ This portion of the OSHA rule affects the process of exchange, a Stage 3 regulation. Although these data sheets may travel with the product in interstate commerce, a broad federal preemption of all such

27. Hazard Communication, 48 Fed. Reg. 53,343 (1983) (to be codified at 29 C.F.R. § 1910.1200 (f)(1)-(9)).

28. *Id.* at 53,343 (to be codified at 29 C.F.R. § 1910.1200 (g)(1)-(10)).

29. *Id.* at 53,344 (to be codified at 29 C.F.R. § 1910.1200 (h)(1)-(2)).

30. *See supra* note 21.

31. Hazard Communication, 48 Fed. Reg. 53,343 (1983) (to be codified at 29 C.F.R. § 1900.1200 (f)(5)).

32. *Id.* (to be codified at 29 C.F.R. § 1900.1200 (g)(1)).

33. *Id.* (to be codified at 29 C.F.R. § 1900.1200(g)(1)-(10)).

34. *Id.*

35. *See supra* note 22.

state laws is inappropriate. Federal preemption is only appropriate where states require data sheets to be an integral part of the product package (and thereby burden the national market) or set standards that are below the federal minimum. The state data sheet requirements may increase the cost of doing business in individual states, but these increased costs do not affect the scale economies in production and packaging available to manufacturers. Manufacturers also can easily allocate these increased costs to products sold in the states imposing them. Moreover, the states' interest in safety provides a sufficient basis for leaving the calculation of purely local cost/safety tradeoffs to state legislatures.

Finally, the OSHA rule established employee training and information standards,³⁶ and provided authority for preempting divergent state requirements.³⁷ These standards are Stage 5 "conditions on use," and have a solely in-state impact. Where these rules do not conflict with minimum federal standards, states should be permitted to require additional employee safety training and education. Therefore, this broad grant of federal preemptive authority, at the expense of state interests in worker health and safety, is inappropriate.

To summarize, some, but not all, aspects of the new OSHA rule justify national uniformity. The specific impacts of the regulations must be evaluated to determine the state and federal interests involved, and consequently the appropriate allocation of regulatory authority among the competing levels of government.

Conclusion

Chemical labeling offers one example of the federal government's failure to recognize the important federalism issues raised by social regulation. This is not an isolated incident of federal overreaching, however. The Food and Drug Administration,³⁸ the Federal Trade Commission,³⁹ and the Department of Energy⁴⁰ all have recently flexed their preemptive muscles. In addition, the shifting political alignments surrounding federalism disputes presage a rising number of clashes. Clearly, policymakers in all branches of the federal government soon will have to grapple with

36. See *supra* note 29.

37. See *supra* note 22.

38. 47 Fed. Reg. 50,442 (1982) (to be codified in scattered sections of 21 C.F.R. pts. 211, 314 and 700) (FDA preempted further state packaging requirements but excluded certain products).

39. *Katherine Gibbs School v. FTC*, 612 F.2d 658, 667 (2d Cir. 1979) (FTC's proprietary, vocational, and home study school rule was set aside in part because the FTC exceeded its power by declaring a blanket preemption of any state rule that frustrated the purpose of the FTC rule).

40. Energy Conservation Program for Consumer Products, 48 Fed. Reg. 39,376 (1983) (to be codified at 10 C.F.R. § 430.32) (Department of Energy refused to issue energy-efficiency standards for some appliances and asserted that these "no-standard" standards preempted state regulations).

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difficult federalism questions. The challenge is to develop principled responses that can override shifting political pressures.

The narrow political goals of interest groups always will, and indeed should, influence democratic decisionmaking. Political pressure, regardless of the principles of federalism, is an inevitable part of the process. However, the politics of federalism pose considerable risks to the delicate intergovernmental balance. Just as Washington-directed deregulation may compromise federal interests in national minimum standards and a national market, unnecessary uniformity through federal preemption risks centralization at the expense of legitimate state concerns.

The alternative model presented here reconciles the important federal and state interests in regulation. While the politics of federalism will always be played, our lawmakers must not allow politics to override the nation's commitment to the greater and more enduring principles of federalism.

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